BRUNEI REPORT

LAU'S TIMBER CO. v. PACIFIC & ORIENT UNDERWRITERS PTE. LTD.

[O.C.J. (Blair-Kerr J.) September 21, 1972]

[Brunei, Bandar Seri Begawan — Civil Suit No. 18 of 1972]

Insurance — Marine insurance — Total loss policy — Partial loss — Constructive total loss — Marine Insurance Act, 1966, ss. 60 and 61.

The plaintiffs claimed on an insurance policy in respect of the transportation of a tractor. The policy covered total loss only. When the tractor was being transported to Bandar Seri Begawan, while it was being loaded on to a tongkang, it slipped into the river. It was subsequently salvaged and repaired. It was alleged that as the cost of salvage and repairs exceeded the value of the goods on arrival, there was a constructive total loss.

Held: the insurance policy in this case covered total loss only; and as in any event the plaintiffs had failed to prove a total constructive loss, the action must be dismissed.

CIVIL SUIT.

Joseph Tan for the plaintiffs.

L. A. J. Smith (*Daniel Tajen* with him) for the defendants.

Blair-Kerr J. (sitting as Commissioner): The plaintiffs operate a timber concession in Temburong; and about June 1971 they purchased a second-hand D6B Tractor. When it was purchased it could not have been in very good condition because according to the plaintiffs' manager (a Mr. Lau) they had to spend about $30,000 in order to make it serviceable.

Having used the tractor for 5 months in the timber concession, it was due for an overhaul; and early in November the plaintiffs decided to send it to Bandar Seri Begawan. The only means of transport between Temburong and Bandar Seri Begawan is by river and sea; and it was arranged that the tractor should be conveyed by a motor tongkang named the Eng Guan. The freight for the double journey was fixed at $800 *i.e.* $400 each way.

At Temburong the river is, to a certain extent, tidal. At low tide, there is certainly no more than 5 feet of water, perhaps less. At high tide there is rather more. There is no proper pier; a motor tongkang simply lowers its bow flap on to the river bank, and endeavours to remain in that position by keeping the engines running while cargo is loaded.

In this case, while the tractor was being moved on to the motor tongkang, it slipped into the river. From the evidence called, I was far from clear how exactly the accident occurred. There was a suggestion that the ground was wet because of rain and that the vehicle somehow bumped into the side of the tongkang and that it then slid sideways into the water coming to rest a few feet from the edge of the bank. The canopy and upper structures of the vehicle were visible above the water when it came to rest. Clearly the water was not deep, although there was evidence that the bed of the river was muddy.

After the accident the plaintiffs sub-contracted the work of operating the timber concession to another contractor named Lau Ming Guan Sawmill. This company carried on their timber business some 4 miles or so from the point where the accident occurred; and they owned a Japanese Komatzu tractor.

The plaintiffs' manager (Mr. Lau) testified that he wanted to get the tractor out of the river as soon as possible, particularly as it was causing an obstruction to navigation, but that he could not find anyone who was prepared to undertake the job. The plaintiffs called the proprietor of a firm called Borwares & Co., whose address is 49 Jalan Sultan, Bandar Seri Begawan. This witness said that the Lau Ming Guan Sawmill was owned by his brother and that he himself worked in his brother's business. He said that he arranged with his brother's firm for the use of the Komatzu tractor to pull the plaintiffs' tractor out of the river.

The Borwares witness produced in evidence a document dated 28th December 1971 (Ex. E). It purports to be a quotation "for charges on" the plaintiffs' tractor and transporting it to Brunei for the sum of $14,750. In examination-in-chief, Lau alleged that he had paid Borwares & Co. this sum; but he admitted that he could not produce any receipt for the alleged payment. In cross-examination he told a different story. He said that Borwares & Co. had an account with his company and that he paid Borwares by supplying them with timber — presumably to the value of $14,750.

The proprietor of Borwares & Co. did not say that the plaintiffs had paid him $14,750. However, he alleged that he "agreed to pay" $7,000 for the hire of the Komatzu tractor and that he had paid $3,000 to another barge owner for the transportation of the plaintiffs' tractor to Bandar Seri Begawan. His allegation was that he did not pay the barge owner in cash but that he supplied him with oil for his barge to the value of $3,000. There were no receipts or other documents of any kind produced in evidence; and I simply did not believe any of this evidence. In my view the cost of taking the tractor out of the river was very much less than $14,700. No doubt Borwares & Co. and the Temburong sub-contractor were well aware that the plaintiffs were going to institute this action against the defendants — an insurance company.

The plaintiffs' tractor reached Bandar Seri Begawan early in January and it was taken to Tractors Malaysia Berhad for repairs. The total amount spent on repairs was $23,552.63; and eventually, in court, the parties agreed that, of this sum, $9,410 was attributable to the vehicle having been in the river for the best part of two months. The remainder of the cost was in respect of the overhaul of the vehicle which was due to be carried out anyhow in November 1971.

Now, going back to 5th November 1971 Mr. Lau came to Bandar Seri Begawan that day. He called to see his friend, a gentleman named Conrad Azcona, whose firm were agents for an insurance company named the London and Pacific Insurance Co. It appears that Mr. Lau asked Azcona whether his firm would effect marine insurance in respect of the transportation of the tractor from Temburong to Bandar Seri Begawan. Azcona said in evidence that he re-

fused because he had "no definite instructions to undertake marine insurance." However, Mr. Azcona spoke to Mr. Andrew Chin of the plaintiffs' Brunei office by telephone and asked him whether the plaintiffs would insure the tractor in respect of the voyage. Chin told Azcona that the plaintiffs were prepared to effect insurance cover but he added: "We only cover total loss only."

Later, Lau and Azcona called to see Chin and Chin made out an application form (Ex. M) for Lau to sign. It is in the form of a letter; and it reads: —

"Dear Sirs,

Please issue to us a Marine Policy/Cover Note/Certificate ... as per the following particulars: —

....

Policy in name of M/S Lau's Timber Co.

Per vessel Eng Guan M.T.

Sailing 5th November 1971

From Temburong To B.S. Begawan.

Terms of cover: T.L.O.

....

(Sgd.) Lau's Timber Co."

There was evidence that "T.L.O." is an abbreviation for "total loss only" and that this is universally understood as such by person in the insurance business.

Lau and Azcona read this document; and Lau signed it. Chin then caused to be made out a Certificate of Insurance (Ex. A) which reads: —

"5th November 1971 No. 9B011/40/00016/0.

This is to certify that goods as specified hereunder shipped per Eng Guan M.T. sailing on or about 5th November 1971 from Temburong to B.S. Begawan have been insured by us Subject to all terms and conditions of the Lloyds Standard Form of cargo policy (S.G. Form) on account of M/S Lau's Timber Company for a value of $34,000 upon one unit Caterpillar D6B Tractor 1966 model serial No. 44A5855. Warranted against Total Loss of the cargo resulting from Total Loss of the vessel, including loading and unloading.... In the event of loss or damage which may involve a claim under this insurance, immediate notice of such loss or damage should be given to and a Survey Report obtained from Harrisons and Crossfield...."

This was a printed form; but the words "warranted against Total Loss of the cargo resulting from Total Loss of the vessel" were typed in; and when Lau and Azcona read these words they asked Chin to add the words "including loading and unloading" — which he did.

Lau and Azcona did not ask to see a Lloyds S.G. form. Such a form was never completed or attached to the Certificate of Insurance (Ex. A) and no further reference was made to it. The terms of the S.G. form were simply not in the contemplation of the parties. What Lau and Azcona appeared to be concerned with was that the words "including loading and unloading" should be added.

Paragraph 2 of the statement of claim reads: —

"2. By a policy of marine insurance No. 9B011/40/00016/0 dated 5th November 1971 and made between the plaintiffs and defendants, the defendants in consideration of the payment of the premiums mentioned therein, which premiums were duly paid by the plaintiffs, agreed to insure the said tractor subject to all the terms and conditions of the Lloyds Standard Form of Cargo policy...."

In their defence, the defendants said: —

"The defendants admit the making of the policy dated 5th November 1971 referred to in para. 2 of the statement of claim but deny that they are liable...."

Counsel for the plaintiffs submitted that because the defendants said they admitted the making of the policy "referred to" by the plaintiffs that somehow this should be taken as an admission that the policy was an all-risks policy. I do not accept this submission. The endorsement on Ex. A is perfectly clear. The plaintiffs asked for a total loss policy and they got it

Furthermore, paragraph 2 of the statement of claim is inaccurate in another respect. Ex. A makes no reference to the consideration *viz.* the premium. That was undoubtedly agreed to by the parties that afternoon. It was worked out by Chin on the basis of it being a total loss policy (not an all-risks policy) at $272.50. Chin issued a separate Premium Debit Note (Ex. C) for this sum and Lau paid the amount and received from Chin a separate receipt (Ex. B).

When the tractor was taken to Tractors Malaysia Berhad word must have got around that an insurance company was involved. Tractors Malaysia produced their "estimate" of the repairs and this came to $47,700; and when the defendants refused to pay either this sum or the sum of $14,750, the plaintiffs then issued their writ in which they particularised the damage suffered by them namely, $14,750 plus $47,700 *i.e.* $62,450; but, as the policy was a valued policy, the claim was limited to the full agreed conventional value of the tractor *viz.* $34,000.

Paragraph 3 of the statement of claim reads: —

"3. During the loading of the tractor onto M.T. Eng Guan at Temburong on the 5th November 1971... the tractor fell into the river and sank and thus became lost by the perils insured."

It did not say (as one might have expected if it was intended to claim for a partial loss)

"... fell into the river and sank. Subsequently the tractor was recovered from the river, transported to Brunei, and repaired. The plaintiffs elected to treat the constructive total loss as a partial loss and claim" etc.

Except for the particulars, the defendants may be pardoned for thinking at one stage that the plaintiffs' claim was for a total loss or constructive total loss.

However, despite the unsatisfactory way in which their claim has been framed, I am prepared to accept it from the plaintiffs that their claim is for a partial loss. As I have said, the amount of the repairs attributable to the accident is now agreed at $9,410. I am not prepared to accept the Borwares "quotation" of $14,700 for taking the tractor out of the river. This figure is outrageously high; and the impression I got from seeing and hearing these witnesses for the plaintiffs was that they were simply trying to get as much out of the insurance company as they thought they could. As I have said, I do not accept the plaintiffs' evidence that they have paid Borwares & Co. this sum of $14,700.

I shall therefore fix what I think is a reasonable figure for this work. After all, what Borwares, or rather the local contractor at Temburong, did was sim-

ply this; Two coolies from the sawmill put a wire rope round the plaintiffs' tractor, anchored the Japanese tractor to a tree as a safety measure, pulled the plaintiffs' tractor out of the river and then pulled it onto a motor tongkang and had it conveyed to Bandar Seri Begawan. I doubt whether the freight to Bandar Seri Begawan is covered by the policy. But to be on the safe side I shall include that item. I shall fix the sum of $3,000 for taking the tractor out of the river and conveying it to Bandar Seri Begawan. I am sure that that is more than sufficient.

As I understood counsel for the plaintiffs when he opened his case, it was this:

"We do not agree that the policy is a 'total loss only' policy; but we agree that it is a 'total loss' policy. By virtue of section 56(3) of The Marine Insurance Act 1906, an insurance against total loss includes a constructive, as well as an actual, total loss. We agree there was no actual total loss; but there was a constructive total loss within the meaning of section 60 of the Act — in particular section 60(2)(iii) which provides that ' in the case of damage to goods when the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival'; we have succeeded in proving a constructive total loss; and we plead in aid section 61 of the Act which reads: 'Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject matter insured to the insurer and treat the loss as if it were an actual total loss'; we have treated the loss as partial and therefore no notice of abandonment (as required by section 62 of the Act) was necessary; and we quantify our damage in accordance with section 71(3) of the Act."

There was evidence that the value of the tractor in its damaged state on arrival in Bandar Seri Begawan (before any repairs had been carried out) was $16,000; and counsel for the plaintiffs argued that there was a constructive total loss within the meaning of section 60(2)(iii) because if one added $14,700 to $11,942.88 (which, in counsel's submission at that stage of the case, was the cost of repairs to the tractor attributable to the accident) one gets $26,642.88 — which is $10,642.88 in excess of $16,000.

The fallacy of this argument is this: The words "their value on arrival" as appearing in section 60(2)(iii) do not mean "their damaged value on arrival", but "their conventional value as agreed by the parties" — in this case $34,000. After all, there was no evidence that the true value of this tractor before the accident was other than the conventional agreed value.

The defendants went further. They said:

' Not only have the plaintiffs failed to prove a constructive total loss [the figures now are $3,000 for taking the tractor out of the river and $9,410 for repairs i.e. $12,410; and that is far below the conventional agreed value viz. $34.000]; we say that the policy was a 'total loss only' policy, that is to say we pay only if there is total loss; we do not pay upon a claim for partial loss; that was made clear in the application (Ex. M) and the fact that the word 'only' has been omitted from the certificate (Ex. A) matters not."

If the plaintiffs could have argued that the whole contract of insurance is contained in the certificate of insurance (Ex. A) the ordinary rules about extrinsic evidence would have applied. But I do not think that in this case one can say that Ex. A contains the whole contract. For one thing, although the premium was agreed on the afternoon of 5th November, we have to look elsewhere than Ex. A for what was agreed in this regard. Furthermore, the application (Ex. M) was signed by Lau a few minutes before he signed Ex. A; and there can be no doubt that everyone was aware that the defendants were offering to insure in respect of "total loss only". The addition of the words "including loading and unloading" admittedly complicates the issue to some extent; but in my view counsel for the defendants is correct in his submission that these words do no more than extend the period of the insurance. They do not alter the fact that the true intention of the parties, despite the omission of the word "only" from Ex. A, was that the defendants would pay upon total loss only and the premium was worked out on that basis.

In my view therefore the plaintiffs' action fails *in limine*.

But if I am wrong in this, there can be no doubt that the plaintiffs failed to prove a constructive total loss; and therefore their action under the Act must necessarily fail.

Towards the end of the hearing, counsel for the plaintiffs appreciated the weakness of his case; and in his closing submission he introduced a new point. He submitted that even if the plaintiffs had failed to prove a constructive total loss they were still entitled to claim for partial loss under the policy itself — presumably on the footing that the greater (total) includes the lesser (partial). As I have said, counsel for the plaintiffs also attempted to argue that the policy was really an all-risks policy because of the words "subject to all terms and conditions of the Lloyds Standard Form of cargo policy" which, as I have said, was never in the contemplation of the parties on the afternoon of 5th November. Whatever else may be said, the plaintiffs sought and obtained a total loss policy. Their only hope was to prove a total constructive loss and then claim for a partial loss by virtue of section 60 and 61 of the Act. This they failed to do, and the action is accordingly dismissed with costs.

For record purposes, I ought to say that during the trial the defendants abandoned what appeared to be their main defence which was that the insuring of the tractor on the 5th November was an utter fraud because the tractor fell into the water on the 4th November. It appears that information to this effect was given to the defendants' investigators; but counsel for the defendants informed me that, having interviewed the witnesses whom it was proposed to call to substantiate this vital fact, he did not feel that they were reliable witnesses and he abandoned this defence entirely.

For record purposes, I will conclude by saying that I did not think that the master of the Eng Guan was a reliable witness. He was called by the plaintiffs; but I put no weight on anything he said.

Action dismissed.